No. 6445.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of the Application of
FOO GUEY and FOO WUNG,
On Habeas Corpus.

Foo Guey and Foo Wung,
Appellants,

vs.

Walter E. Carr, District Director, United States Immigration Service at Los Angeles, California,
Appellee.

APPELLEE'S BRIEF.

SAMUEL W. MCNABB,
United States Attorney,
By MILO E. ROWELL,
Assistant United States Attorney,
Attorneys for Appellee.

HARRY B. BLEE,
U. S. Immigration Service on the Brief.

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APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

This is an appeal from an order of the United States District Court for the Southern District of California, Central Division, discharging the petition for a writ of habeas corpus [Tr. of Rec., p. 14] and remanding appellants, Foo Guey and Foo Wung to the custody of the United States Immigration Service for deportation. Certain Immigration Service records have been filed with

the clerk of this court pursuant to an order of the District Court [Tr. of Rec., p. 25]. These records will be designated in the following manner when it is necessary to refer to them in this brief: Bureau of Immigration File 55704/782; San Francisco file 18703/1-25; San Francisco file 21068/3-3; San Pedro file 30160/50 and San Pedro file 30160/51. The printed transcript of the proceeding in the District Court will be referred to as "Transcript of Record".

STATEMENT OF FACTS.

Foo Guey and Foo Wung, appellants herein, were both born in China and are of the Chinese race. They arrived at San Pedro, California, about February 23, 1930, on the steamship "President McKinley" and applied for admission at that port as the minor sons of Foo Fu, the latter being a Chinese merchant, lawfully domiciled within the United States. After due hearing by the Board of Special Inquiry, at San Pedro, California, the appellants were excluded from admission to the United States as

> "alien immigrants of a race ineligible to citizenship and not exempted by any of the provisions of Section 13 (c) of the Act of May 26, 1924; as persons not in possession of unexpired immigration vises; and as persons of the Chinese race not in possession of duly viseed Section Six Certificates. In addition to the above grounds, both applicants were debarred as persons likely to become public charges and Foo Wung was denied admission on the additional ground that he was a person under sixteen years of age not accompanied by or coming to join one or both parents."

Thereafter an appeal was filed in accordance with law and a complete record of the proceeding was transmitted to the Secretary of Labor at Washington who on May 9, 1930, caused an order to be issued affirming the excluding decision of the Board at San Pedro. Appellee was prepared to return appellants to China in accordance with law when habeas corpus proceedings were instituted After due hearing, the District Court discharged the petition and remanded appellants to the custody of appellee [Tr. of Rec., p. 14]. From this judgment and order, this appeal has been taken.

QUESTIONS AT ISSUE.

There are only two questions at issue before this Honorable Court.

1. Has the relationship between appellants and Foo Fu been satisfactorily established?
2. Was the hearing that resulted in the order of exclusion a fair hearing?

ARGUMENT.

It is the contention of appellee that the facts in law justified the excluding decision. In reaching this conclusion, the two questions referred to under the heading "Questions at Issue" will be discussed.

As to the First Question.

Has the relationship between appellants and Foo Fu been satisfactorily established?

Section 23 of the Immigration Act of 1924 (Section 221, Tit. 8, U. S. C.) provides in part as follows:

> "Whenever any alien attempts to enter the United States, the burden of proof shall be on such alien to establish that he is not subject to exclusion under any provisions of the immigration laws. . . ."

The appellants are both aliens and the burden is placed upon them by law to show that they are entitled to admission. The only way that the immigration officers could determine the truth of the relationship claims advanced was to question the appellants, their alleged father, and the prior landed brother, regarding matters that should be common knowledge among members of the family. If such testimony had been in substantial agreement, the Board of Special Inquiry might well have decided that the relationship claim had been sufficiently established to justify admission of appellants to the United States. If, on the other hand, such testimony was in disagreement on material matters, the Board may properly have concluded that the relationship does not exist. It will be seen that the Board of Special Inquiry was in the sense handicapped in taking up an inquiry of this character. It is seldom that immigration officers are in position to offer evidence to controvert the claims made by applicants in cases of this character. It becomes necessary, therefore, in such cases for the officers to ask many detailed questions during the course of the examination in an effort to determine whether the case is *bona fide* or is a fraudulent one, where the witnesses have been carefully coached as to the testimony they are to give. Such procedure is recognized by this Honorable Court in cases of this character as indicated by its decision in *Wong Foo Gwong v. Carr,* 50 Fed. (2d) 362, wherein the court held in part

> "the Immigration officials must necessarily base their decisions upon conflicts or agreements that arise in the testimony of applicants for admission and that of their witnesses."

In according hearing to these appellants, the immigration officers had no desire to entrap the witnesses or to develop discrepancies in testimony. Their sole object was to determine the truth.

On pages 20 and 21 of the Board hearing accorded appellants as it appears in Bureau of Immigration File 55704/782, will be found twenty-two discrepancies in testimony involving the appellant Foo Guey. On pages 21 and 22 will be found eighteen discrepancies in testimony involving the appellant Foo Wung. While some of these discrepancies may not be considered as material yet the Board of Review considered some of them of such materiality that it sustained the excluding decision of the Board of Special Inquiry. In the Bureau of Immigration File 55704/782 will be found an original memorandum prepared by the Board of Review dated May 9, 1930, and in that memorandum certain discrepancies are pointed out which challenged the relationship claim advanced.

The first of these discrepancies involves the age of the appellants. Reference to the testimony of Foo Fu as it appears in his sworn statement of November 30, 1919, incorporated in San Francisco File 18703/1-25, indicates that in San Francisco on the date in question, he claimed Foo Wing (Wung), one of the appellants herein, was eight years of age, and that he had been born C. R. 1-3-23 (May 9, 1912). In the same statement he claimed that Foo Guey, the other appellant herein, was then five years

of age and that he had been born C. R. 3-8-15 (October 4, 1914). That statement is in conflict with the testimony of Foo Fu before the Board at San Pedro, is in conflict with the testimony of Foo Wai, the identifying witness, and is in conflict with the testimony of appellants themselves.

The second discrepancy of note is that with reference to the home village of the appellants in China. They testified before the Board that their home village consisted of three houses. Never within their memory apparently, had their been more than four houses in the village. One of these houses burned several years ago. According to the descriptions and diagrams furnished by the appellants there has never been an ancestral hall in the village as far as they can remember and they have always lived in the first house in the front of the village. According to the diagram submitted by the alleged father in 1922, there were six dwelling houses in the village and an ancestral hall as well. Furthermore, the alleged father in 1922 indicated in a diagram that the house where his family lived, which is the house that the present appellants claim is their home, is the second house in its row. The existence of the ancestral hall was testified to by the alleged father and by the alleged brother in 1922. That was only eight years ago and appellee believes that both of these appellants, who are aged 18 and 15 respectfully, should know of the existence of this ancestral hall, if they were in fact natives of the village in discussion.

There is also some difference of testimony as to which way the village faces. In 1922 the alleged father and

the prior landed alleged brother, Foo Wai, testified that the village faced the west. In their examination at San Pedro, the appellants testified that the village faces east [pages 10 and 16, hearing of March 18, 1930, appearing in Bureau of Immigration File 55704/782], and seemed definitely to have fixed the direction the village faces when they testified that the sun rises in front of the village and sets behind it.

In 1922, when Foo Wai, the identifying witness, was an applicant for admission, as indicated by San Francisco File 21068/3-3, detailed testimony was given regarding Chinese residents of the village. The appellants herein know practically nothing concerning those neighbors. While during the eight years intervening there may have been some changes in the residents of the neighborhood, it is not reasonable to believe that there would be so complete a change in the population that the appellants would have no knowledge of the former residents.

There is also a discrepancy between the testimony of the alleged father and of the appellant Foo Guey. The father testifies [page 3, hearing of March 18, 1930, appearing in Bureau of Immigration File 55704/782] that Foo Guey started to school two years before he, the alleged father, left China in 1919. The appellant testifies [page 7 of the same record] that he did not start to school until he was eleven years, which was after his father left home.

In order for the Board of Special Inquiry to have found that Foo Fu is the father of the appellants, it would have been compelled to rely upon a record fraught with discrepancies and contradictions. The Board be-

lieved that the appellants had not sustained the burden of proof placed upon them by law and excluded them. It is well decided that the courts will not interfere with the findings of administrative officials upon issues of fact involved unless it can be shown that those findings could not reasonably have been reached by a fair minded man and hence are arbitrary.

Chin Share Nging v. Nagle (C. C. A. 9th), 27 Fed. (2d) 848.

See also:

Ng Fung Ho v. White, 259 U. S. 276;
Wong Nung v. Carr, 30 Fed. (2d) 766.

For the above reason, appellee contends that the first question "Has the relationship between appellants and Foo Fu ben satisfactorily established?", must be answered in the negative.

As to the Second Question.

The second question relates to the fairness of the hearing which resulted in the order of exclusion. Later in this brief we will discuss the various grounds upon which counsel bases his claim to unfairness. For the present, appellee believes it is sufficient to point out that the hearing in the case at bar was conducted by members duly authorized to conduct such hearings and that the hearing throughout proceeded in accordance with rules prescribed by the Department of Labor. The appellants were examined, their witnesses were examined, and they were allowed to produce evidence and testimony to substantiate their claims. After the excluding decision had been en-

tered, counsel filed a brief in behalf of appellants. It cannot be said, therefore, that as far as the method of procedure followed is concerned, there was any unfairness. We do not believe that the allegations of unfairness is supported by the record and feel that a perusal of the record heretofore filed will support appellee's contention on this point.

Therefore, appellee respectfully contends that the second question "Was the hearing that resulted in the order of exclusion a fair hearing?", must be answered in the affirmative.

REPLY TO APPELLANTS' BRIEF.

Counsel for appellants advances three grounds to support his contention that the appeal herein should be sustained. We will discuss these points in the order in which they appear.

First Ground.

On page 8 of his brief, counsel contends that

> "The hearing conducted by the Immigration officers was unfair because it did not afford appellants and their interested relatives (father and brother) a full and complete opportunity to testify on material matters."

On page 8 of his brief counsel cites numerous cases which hold in effect that the authority of immigration officers must be fairly exercised and must be consistent with the fundamental principles of justice embraced within the conception of due process of law. Without detailed reference to these cited cases, appellee concedes that the holdings are correct and contends that the hearing in the case

at bar was held in accordance with the principles laid down in those decisions.

On page 9 of his brief counsel points out that during the hearing at San Pedro, neither the alleged father of the appellants nor the prior landed alleged brother of the appellants were asked any questions regarding the home village of the appellants in China, the testimony of the alleged father and of the prior landed alleged brother as given by them at the time the latter was an applicant for admission at San Francisco in 1922 being the only basis by which the truth of present testimony may be judged. Appellee believes that procedure was the only procedure the Board consistently could have followed. The alleged father has not been in China since 1919. The prior landed alleged brother has not been in China since 1922. Manifestly, therefore, the alleged father and the alleged brother were not in position to give testimony regarding changes in the home village since they were there last, and it would have been futile for the Board to have questioned Foo Fu and Foo Wai concerning the home village since they were there last. But in the testimony given by the alleged father and the alleged brother in 1922 regarding the identity of the people in the neighborhood of the home village in China at that time, a number of persons were specifically named. The appellants knew practically none of those people. They should have known some of them at least had they resided in the home village in 1922 and thereafter as claimed by them. It does not seem reasonable to suppose that appellant Foo Guey, who in 1922 was ten years of age, or that Foo Wung, who in 1922 was seven years of age,

would have no knowledge of the identity of the people living in their own neighborhood. Furthermore, these people unquestionably lived in that neighborhood later than the year 1922. Normal boys of those ages know everybody in their own immediate neighborhood. Counsel has ingeniously pointed out that changes frequently occur in the names of Chinese people. It hardly seems possible that all of the people in the vicinity of the appellants home in China would have found it necessary to change their names. If those changes occurred, they must have occurred since 1922, and if the appellants knew them under their old names the presumption is that they would know them under their new names. We do not believe that counsel's explanation on this point is tenable. Nor did the Board of Review in Washington overlook the changes that the passage of time might bring, for in its memorandum of May 9, 1930, appearing in the Bureau of Immigration File 55704/782, the Board of Review stated:

> "Some allowance must therefore be made in comparison of the testimony of these Applicants with that of their witnesses for expectable lapses of memory, but the outstanding disagreements which this testimony shows are between that given by these applicants now and that which was given by their alleged father and prior landed alleged brother when the latter was applying for admission in 1922."

For the reasons above stated, appellee believes that failure of the Board at San Pedro to question the alleged father and the alleged brother of appellants concerning present conditions of the home village in China, cannot be construed as not affording the alleged father and alleged brother complete opportunity to be heard.

On page 9 of his brief counsel points out that there is a substantial agreement between all parties with regard to the main items of information concerning the appellants' family history. He cites *Gung You v. Nagle*, 34 Fed. (2d) 848 and *Hom Chung v. Nagle*, 41 Fed. (2d) 126. We do not believe the cited cases can offer a standard by which the case of these appellants may be judged. Those cases were decided upon their own merits. This case must be decided in the same manner and we feel that an examination of the record will substantiate the findings of the Board of Special Inquiry at San Pedro and the findings of the Board of Review in Washington that there was not a substantial agreement in testimony sufficient to warrant admission of these appellants.

Pages 10 to 16 of counsel's brief points out that errors in translation and transcription sometimes appear in immigration records and urges that fact as a further reason why the alleged father and alleged brother of appellants should have been questioned by the Board at San Pedro relative to present conditions in the home village in China. As an example of possible misunderstanding that may arise during these examinations, on pages 11 and 12 of his brief counsel cites *verbatim*, testimony concerning the correct name of a certain village in China and apparently considers this variation in the name of the village an example of how such unexplained testimony may militate against the appellants. While the Board at San Pedro referred to the discrepancies regarding the proper name of this village [see discrepancy No. 13, page 22 of the hearing, appearing in the Bureau of Immigration File 55704/782], yet it will be noted from the memo-

randum of the Board of Review in Washington under date of May 9, 1930, appearing in the same file, that no reference is made to this discrepancy in names nor is there any indication that the Board even considered that discrepancy in reaching its conclusion. It is doubtless true, as pointed out in *Ex parte Cheung Tung,* 292 Fed. 997, which case is referred to by counsel on page 11 of his brief, that sometimes mistakes do creep into these immigration records but it cannot be believed that all of the immigration records are always incorrect. Counsel even goes so far as to set forth on page 10 of his brief "there is no absolute certainty that the 1919 and the 1922 records are correct in what they purport to show with regard to the statements then made by these witnesses concerning the village." Foo Fu and his alleged son, Foo Wai, were admitted at San Francisco upon the strength of those records and it must be conceded that those records were sufficiently correct to justify those admissions. We feel that it ill behooves counsel to attack the correctness of those records now. That it is proper for the Immigration Service to rely upon its own official records may not be disputed. In *Wong Foo Gwong v. Carr, supra,* this Honorable Court held in part:

> "It is a well established rule in cases of this kind that it was not improper for the Immigration officials to refer to their past records in order to determine the weight to be given to the testimony of the alleged father Wong Sheh Woo. Tang Tun v. Edsell, 223 U. S. 673."

In *Ex parte Keizo v. Kamiyama,* 44 Fed. (2d) 503, this Honorable Court held "the Immigration authorities are entitled to take notice of all our records."

On page 16 of his brief, counsel contends that reasonable opportunity should have been allowed the witnesses to explain appellants' disagreements in their testimony. On page 2 of Foo Fu's testimony of March 18, 1930, as it appears in the Bureau of Immigration File 55704/782, the court will note that Foo Fu was given opportunity to explain the discrepancies as to the birth dates of these appellants. On page 3 of the same record Foo Fu was given an opportunity to explain the difference in the names applicable to the home village. On page 4 of the same record Foo Wai was given the same opportunity, and throughout the record witnesses were given a chance to explain certain disagreements in testimony. No opportunity was given Foo Fu or Foo Wai to explain the discrepancies regarding the existence of the ancestral hall in the home village. The testimony of both of these witnesses in 1922 was positive as to the existence of the ancestral hall. The testimony of the appellants before the Board at San Pedro was equally positive as to the nonexistence of the ancestral hall. Appellee contends that as to this feature there was nothing to explain. As heretofore pointed out, the Board of Review apparently disregarded the discrepancy as to the names of the village in China and the Board of Review memorandum of May 9, 1930, indicates (paragraph 3) that allowance must be made for "lapses of memory," and, in paragraph 5 of the same memorandum points out that some changes must have taken place in the home village during the previous eight years. With these facts taken into consideration, however, the Board could not overlook the glaring discrepancies which apparently were unexplainable and felt that it could not concede that the appellants herein had established the relationship claims sufficiently to entitle them to admission.

Second Ground.

On page 17 of counsel's brief, appears this heading:

> "The decision of the Immigration authorities was not supported by substantial evidence."

While the Circuit Court of Appeals for the First Circuit apparently has held in the cases cited on pages 17 and 18 of counsel's brief, that there must be some substantial evidence to support the excluding decision of the Immigration authorities, we find no cases decided by this Honorable Court wherein the same doctrine has been adopted. Nor do we believe that *U. S. ex rel. Leong Ding v. Brough,* decided by the Circuit Court of Appeals for the 2nd Circuit, 22 Fed. (2d) 926, indicates that that court has unqualifiedly adopted the line of reasoning followed by the Circuit Court of Appeals for the 1st Circuit. The decision in the Leong Ding case seems to have turned on the question as to whether the slight contradictions in the record justified rejecting the testimony which otherwise supported the appellant's claim.

In further support of his theory, counsel cites the case of *Nagle v. Wong Ngook Hong et al.,* decided by the District Court in the Northern District of California in January, 1928. Appellee has made a vain but diligent search for the District Court report in this case but has been unable to locate it and believes that the District Court decision is unrecorded. A careful reading of the case as decided by this Honorable Court on appeal, however, as reported in 27 Fed. (2d) 650, seems to indicate that the decision was affirmed on the theory that the discrepancies in testimony of applicants and their wit-

nesses were insufficient to justify the excluding decisions of the Immigration authorities. At any rate, we find nothing in the Circuit Court of Appeals' decision to support the theory contended for by counsel.

Appellee believes that substantial evidence to support the excluding decision was not required in the case at bar nor in the Circuit Court of Appeals cases cited by counsel and feels that in reaching its conclusions, the Circuit Court of Appeals for the 1st Circuit failed to take into consideration Section 23 of the Immigration Act of 1924 (Tit. 8 U. S. C., Section 221), reading in part as follows:

> "Whenever any alien attempts to enter the United States, the burden of proof shall be upon such alien to establish that he is not subject to exclusion under any provisions of the Immigration laws. . . ."

Appellants herein are both aliens. They are attempting to enter the United States. The burden of proof is placed squarely upon them by law to establish that they are not subject to exclusion. This burden of proof remains with the appellants throughout the case and failure to meet that burden must result in exclusion. The law does not place upon the Government the burden of producing evidence to support an excluding order. This theory was recognized by the United States District Court, Northern District of California, on November 24, 1926, in *Ex parte Jew You On*, 16 Fed. (2d) 153, where the court held in a case of a Chinese applicant seeking admission to the United States as the son of a citizen of this country:

> "The question is not, Is there substantial evidence to support the judgment of exclusion? but is only, Is the said judgment supported by law, in view of the facts as the Immigration officers find them?"

The correctness of this theory has been recognized by this Honorable Court in *Jew Theu v. Nagle,* 35 Fed. (2d) 858, 859. In that case the applicant sought admission as the son of an American born Chinese father and was excluded. In deciding the case, this Honorable Court held in part:

> "The single question is whether the evidence submitted on the application for admission so conclusively established the alleged relationship that the order of exclusion should be held arbitrary or capricious."

This same theory was followed in *Jue Yim Ton v. Nagle,* decided by this Honorable Court and reported in 48 Fed. (2d) 752.

Under the Jew Theu and Jue Yim Ton cases, *supra,* the correct test seems to be, not whether the Immigration authorities had substantial evidence to support the excluding decision, but whether the applicants have so conclusively established the relationship claim that an excluding decision is arbitrary or capricious or unfair.

From the above it will appear, therefore, that counsel's second ground is untenable.

Third Ground.

On page 19 of his brief, counsel contends:

> "The decision of the Immigration authorities was arbitrary and an abuse of discretion."

Counsel cites certain cases on page 20 of his brief in support of his theory that the courts will not permit exclusion of applicants where the board has acted arbitrarily and abused its discretion in arriving at its excluding decision. Appellee does not question this theory. Each case must be decided upon its own particular facts. Appellee believes that the record in this case will convince

this Honorable Court that no opportunity was denied the appellants to establish their claim, or that in reaching its decision, the Board abused its discretion or took arbitrary action in arriving at its decision. From the discrepancies developed in testimony, the Board simply did not believe that the appellants are the sons of Foo Fu and excluded them. As pointed out in *Jue Yim Ton v. Nagle, supra,*

> "The question is not whether this court, acting on the evidence submitted, might have found differently from the executive branch of the Service; the question is whether or not the latter granted a fair hearing and abused their discretion. Tang Tun v. Edsell, 223 U. S. 673; United States v. Ju Toy, 198 U. S. 253; Low Wah Suey v. Backus, 225 U. S. 468."

For the above reasons, appellee respectfully contends that counsel's third ground is untenable.

CONCLUSION.

Appellee respectfully contends:

1. That the relationship between appellants and their alleged father has not been satisfactorily established.

2. That the hearing which resulted in the order of exclusion was a fair hearing.

3. That the appeal herein should be dismissed and appellants should be remanded to appellee for return to China in accordance with law.

Respectfully submitted,

SAMUEL W. MCNABB,
United States Attorney,
By MILO E. ROWELL,
Assistant United States Attorney,
Attorneys for Appellee.

HARRY B. BLEE,
U. S. Immigration Service on the Brief.